***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

ORIGINAL

75-2099

# United States Court of Appeals

For the Second Circuit.

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM ROVENDRO,

Appellant.

*On Appeal From The United States District Court For The Eastern District Of New York*

# Appellant's Brief

MARTIN ELEFANT
Attorney for Appellant
16 Court Street
Brooklyn, N.Y. 11241
624-2240



Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

## INDEX TO APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA,

Respondent,

-against-

Docket No.
75-2099

WILLIAM ROVENDRO,

Appellant.

----------x

## PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (Hon. Leo Rayfiel), entered June 16, 1975, denying appellant's application pursuant to Title 28 United States Code 2255, to vacate and set aside his conviction. Martin Elefant, was assigned counsel in the court below, and is continuing to act in that capacity for the purposes of this appeal.

## QUESTION PRESENTED

Was appellant's plea of guilty induced by a false promise of sentence by his court assigned counsel?

## STATEMENT OF FACTS

In a pro se motion, *appellant, William Rovendro, moved in the United States District Court for the Eastern District of New York, to vacate and set aside his conviction after a plea of guilty, and judgment rendered on June 15, 1973, before Hon. Leo Rayfiel, sentencing appellant for a period of three years, to run consecutive to a State sentence.

Specifically, appellant alleged that his plea of guilty was induced by a promise from his court assigned counsel that he would receive a sentence concurrent with his state sentence. On June 10, 1973, a hearing was held before Hon. Leo Rayfiel to determine the truthfulness of appellant's allegations.

Appellant testified that on April 17, 1972, an indictment charging him with a violation of Title 18 U S C 2312, was set for trial (7). ** He was then represented by assigned counsel, Martin Light (8). He discussed this case with Mr. Light, who told him that this was a "meatball case", and that they (federal authorities) wanted a paper conviction, and appellant would receive a concurrent sentence (11, 34).

On appellant's next court appearance, April 2, 1973, Mr. Light, was not present, but instead, Marvin Preminger, his partner

---

* Appendix B
** Numerical references are to the pages of the hearing transcript.

was present to represent him (12, 13). Although appellant pleaded guilty, he was not concerned with what he was actually pleading guilty to (14, 39). Appellant took the plea of guilty, because he expected to receive a three year concurrent sentence (16). He admitted no promises were made to him concerning sentence, because he knew this was a formality from prior state court sentences (15, 32). On June 15, 1973, Mr. Light appeared for appellant and under appellant's direction advised him to withdraw his previous plea of guilty, because appellant realized he would not receive a concurrent sentence (17, 18, 73).

Mr. Preminger testified that he informed appellant on April 2, 1973, that he could represent him adequately (43). Mr. Preminger did not think appellant told him about Mr. Light's discussion of a concurrent sentence, but it was possible that it may have been discussed, but he may have forgotten (45, 52).

Mr. Light testified that he may have told appellant that the United States Attorney was interested in a paper conviction (60). It was Mr. Light's feeling that appellant would receive a concurrent sentence, and that there would be no question or problem, concerning a concurrent sentence (64, 67, 69).

Mr. Vincent Favorito testified that he never told Mr. Light about a paper conviction (77).

On June 16, 1973, Judge Rayfiel denied appellant's motion, primarily on the ground that no evidence was offered at the hearing regarding the charges made by appellant.*

## ARGUMENT

## POINT I

### APPELLANT'S PLEA OF GUILTY WAS INDUCED BY A FALSE PROMISE OF SENTENCE BY HIS COURT ASSIGNED COUNSEL.

The evidence in this case confirms that appellant's plea of guilty was induced by a promise of his attorney that he would receive a concurrent sentence. Instead, appellant received a consecutive sentence. Therefore, appellant's sentence must now be vacated and he must be sentenced to the promised term. Mosher v. La Valle, 49 Fed. 2d. 1346 (1974),; Santobello v. New York, 404 U.S. 257 (1971).

It is settled law that a plea of guilty must be voluntarily and knowingly entered, and that a conviction based on an involuntary plea of guilty is inconsistent with due process and must be set

*The court's opinion in its entirety is set forth in Appendix C.

aside. Santobello v. New York, supra; North Carolina v. Alford, 400 U.S. 25 (1970); Machibroda v. United States, 368 U.S. 487 (1962); Brady v. United States, 397 U.S. 742 (1970). Appellant unequivocally asserted that he pleaded guilty in reliance on Mr. Light's promise that he would receive a concurrent sentence. It is highly unlikely that appellant, a man very familiar with criminal court proceedings would accept a plea unless he knew with some degree of certainty, the maximum sentence that was to be imposed. This is especially true since at the time of plea, appellant was serving time under a state sentence. Under the circumstances, if appellant were truly aware that he would be subjected to an additional three year term, he certainly would not have pleaded guilty. The more rational option would have been for him to risk going to trial, and if convicted, take his chances on appeal, since there were major legal issues he could raise against his indictment. Furthermore, the record clearly establishes that once appellant realized his concurrent sentence was not to be imposed, he made every effort through his assigned counsel, to withdraw his plea. This prompt application on the part of appellant surely lends support to his claim.

In fact, Mr. Light, at the hearing confirmed that it was his feeling appellant would receive a concurrent sentence,

and he so advised him. Moreover, the record shows without a doubt that Mr. Light was not truly dedicated to appellant's defense. First, he did not see appellant for over a one year period to discuss his defense with him. Second, he never made any written motion on the legal aspects of the case. Third, he did not appear on the date set for trial, but sent his partner, who had never before represented appellant. A serious question is thus raised whether appellant was actually afforded effective assistance of counsel, since the facts indicate that it would have been far more expedient for counsel if appellant pleaded guilty, instead of going to trial, so that counsel's obligation to the court would be readily satisfied.

It is submitted that this case falls squarely within this Court's holding in Mosher v. La Valle, supra. In Mosher, the evidence established, as it did in the present case, that the defendant's plea was induced by a false promise by his attorney. This Court, in affirming the District Court's vacatur of the defendant's sentence, held, that such a false inducement was in direct contravention of due process. The Mosher holding must also be applied to this case.

Finally, the District Court's finding that the appellant's plea was not induced by any promises made by any attorney in the

case was misplaced. The courts have consistently held that the colloquy by the court regarding whether any promises or threats have been made to induce the plea is not significant. Hillard v. Beto, 465 F. 2d. 829 (5th Cir., 1972); United States ex rel McGrath v. La Valle, 319 F. 2d. 308 (2d Cir., 1963); United States v. Lateo, 214 F. Supp. 560 (S.D.N.Y., 1963). This is especially true in this case since appellant was admittedly well versed in criminal proceedings and knew the standard answers to give the standard questions.

Hence, under all these circumstances, appellant's sentence should be vacated and he should be resentenced to the promised concurrent three year term. Mosher v. La Valle, supra.

## CONCLUSION

THE DISTRICT COURT'S ORDER
SHOULD BE REVERSED AND
APPELLANT'S MOTION GRANTED.

Respectfully submitted,

MARTIN ELEFANT
Attorney for Appellant.

ELEFANT US v. Rovendro
1572

STATE OF NEW YORK )
: SS.
COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of Sept. , 1975 deponent served the within Brief upon Hon. David Trager, U.S. Atty., East. Dist. of N.Y.

attonrye(s) for
Appellee

in this action, at

225 Cadman Plaza East, Brooklyn, N.Y. 11201

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robt Bailey
.....
ROBERT BAILEY

Sworn to before me, this
29 day of Sept. , 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976